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W. H. BRYSON

Virginia Law Reports and Records, 1776 - 1800

In 1607 Virginia was settled by a London-based corporation, and the English settlers brought with them the municipal law and legal institutions of England.¹ It was specifically required by the instructions to the Virginia Company that litigation was to be settled "as near to the common laws of England and the equity thereof as may be".² In 1632 when commissioners were appointed to hold the monthly courts (later renamed the county courts), their commissions required them to execute the office of justice of the peace and to act "as near as may be after the laws of the realm of England and the statutes thereof made".³ When the statutes of Virginia were recodified in 1662, the common law of England was acknowledged to be in force.⁴ When independence from Great Britain was declared in 1776, a statute was enacted which stated that the general common law of England remained in force,⁵ and this provision has been continued in substance by every Virginia code since.⁶ Thus, one should not be surprised to see the lawyers and judges in *Downman v. Downman* (1791) and *Pickett v. Morris* (1796) relying upon English cases as precedents.

In eighteenth century Virginia before independence in 1776, the basic court structure was a county court for each county and a central court in Williamsburg called the General Court. The General Court had appellate jurisdiction over the county courts and original jurisdiction as well. Appeals lay from the General Court to the Privy Council in London. Although some of the justices of the peace in the county courts may have had legal train-

¹ See generally, W. H. Bryson, English Common Law in Virginia, *Journal of Legal History*, vol. 6 (1985), pp. 249 - 256; W. H. Bryson, Law Reporting and Legal Records in Virginia, 1607 - 1800, in: J. H. Baker, *Judicial Records, Law Reports, and the Growth of Case Law* (1989), pp. 319 - 335.

² 'Articles, Instructions and Orders' (20 November 1606), W. W. Hening, *Statutes at Large of Virginia*, vol. 1, p. 68 [hereinafter cited as: Hening's Statutes].

³ Act of February 1631/32, chap. 33, Hening's Statutes, vol. 1, p. 169.

⁴ Act of March 1662, preamble, Hening's Statutes, vol. 2, p. 43.

⁵ Act of May 1776, chap. 5, § 6, Hening's Statutes, vol. 9, p. 127.

⁶ Virginia Revised Code, vol. 1, p. 135, chap. 38 (1819); Virginia Code, p. 98, chap. 16, § 1 (1849); Virginia Code § 2 (1887); Virginia Code § 2 (1919); Virginia Code Annotated § 1 - 10 (Repl. Vol. 1992).

ing, the large majority were laymen similarly to the English Quarter Sessions, upon which the Virginia county courts were modelled. Also most of the judges of the General Court were not professionally trained. The General Court was composed of twelve gentlemen appointed for life and presided over by the royal governor. This same group also sat in legislative and executive sessions.

After 1776, the place of the Privy Council was given to a new court, the Court of Appeals of Virginia (since renamed the Supreme Court of Virginia). Then in 1777 the equity jurisdiction of the General Court was transferred to a new parallel High Court of Chancery. In 1788 the members of the General Court were required to ride circuit and hold sessions throughout the state in the new appellate district courts. After 1776 all of the judges above the county court level were required to be members of the bar and thus to be professionally qualified.⁷ It is to be noted that the county courts and the Court of Appeals were fused courts having jurisdiction over cases at common law and in equity similarly to the English Court of Exchequer.

It should, therefore, come as no surprise to find that the operation of the Virginia courts at the clerical level was quite similar to that of the English courts. Every court at every level of jurisdiction had a clerk, who was trained as such as an apprentice to an older experienced clerk. The best training available in colonial Virginia was in the office of the Secretary of State in Williamsburg, the Secretary being the official clerk of the General Court.⁸ In the eighteenth century before Independence, the clerks of the county courts were appointed by the Secretary and served in the capacity of his deputies.⁹ After 1776, the clerks were appointed by the judges in whose court they acted. It is an indication of the importance of these officials that, once appointed, they held office during good behavior and not at the will of the judges.¹⁰

The clerks had the general responsibility for managing the office and the records of the courts. The clerk of the county court was a very significant official in that he heard routine procedural motions at rule days¹¹ and generally guided the lay justices of the peace through the court procedures.

⁷ M. V. Nelson, *A Study of Judicial Review in Virginia, 1789 - 1928* (1947), pp. 13 - 29.

⁸ The Secretary delegated this duty to a deputy, who was assisted by under clerks. O. P. Chitwood, *Justice in Colonial Virginia* (1905), pp. 114 - 115; L. R. Heaton, 'This Excellent Man' Littleton Waller Tazewell's Sketch of Benjamin Waller, *Virginia Magazine of History and Biography*, vol. 89 (1981), pp. 143 - 152.

⁹ A. G. Roeber, *Faithful Magistrates and Republican Lawyers* (1981), pp. 47, 69; P. A. Bruce, *Institutional History of Virginia in the Seventeenth Century* (1910), vol. 1, pp. 588 - 591, vol. 2, pp. 397 - 399.

¹⁰ *Virginia Constitution of 1776*, chap. 2, § 15, Hening's Statutes, vol. 9, p. 117.

¹¹ Hening's Statutes, vol. 6, p. 335, vol. 12, p. 33.

The court records kept by the clerks of all of the courts, trial courts and appellate courts, that are relevant to this essay are the order books. In these books, the clerk of the court entered copies of all of the orders made by the court. The orders at this period, 1776 to 1800, were drafted by the clerk or his deputy rather than by a judge or the lawyer representing a party. The orders were entered into the order books chronologically similarly to the order books of the English courts of Chancery and Exchequer and the acta books of the English ecclesiastical courts. Thus the order of the court will normally be a formal note of the action of the court devoid of any reason therefor. Moreover, there are usually few or no facts of the case given.

Thus the modern researcher must rely on the reports of the decisions of the judges. During this period in Virginia, the county court judges rarely gave any opinions for their rulings, or if they did, none were written down. (The only exception to this rule is the small handful of cases reported by David Watson.) This is not surprising because these courts were composed of lay magistrates, and they were composed of several of them who acted upon a majority.

On the other hand, we do have reports of cases from the appellate courts. The judicial routine in these courts at this time was for the court to hear the arguments of the lawyers and then to adjourn to consider their judgment. The court was later reconvened, and the judges each gave their individual opinions orally *seriatim*. These opinions were then noted down by anyone in the courtroom who cared to do so. Sometimes the judges had written notes from which to deliver their opinions; sometimes not. When the judges wrote out their opinions, they might give them to the reporter of decisions after they had been read in court. Indeed, Edmund Pendleton made his notes available to Bushrod Washington.¹² It was not until 1820, however, that the Court of Appeals of Virginia was provided with an official salaried reporter of decisions.

Thus the reports of Virginia cases before 1800 were taken down in open court. At the end of the day, the notes taken in court would be expanded to include a statement of the facts, the arguments of the lawyers, and the reasons for the opinions of the judges. Therefore, it is not surprising that there are errors in proper names, in numerals, and in citations, matters which cannot be corrected by any grammatical context.

Since the reports at this time were created by private persons unofficially, there is not much uniformity to them. Some cases are reported in much greater length than others. If the reporter was representing one of the parties or if he was particularly interested in the case for whatever reason,

¹² 1 Washington [v] (1798). Note also 4 Call [iv] (1833).

there might be a very thorough report of it. Otherwise, it might be very cursory. Moreover, it was in the reporter's sole discretion or whim as to which cases to report and which not. The clerk of court was, of course, required to enter an official record of every case decided by the court.

From the materials copied in the companion volume, we see that the lawyers and the judges relied upon earlier reports, both Virginian and English, but there was no mention of the official records of any case. The records were never printed and were thus unavailable, as a practical matter. They were not printed and published because they normally did not shed any light on the legal reasons given by the judges to support their judgments.

For the period 1776 to 1800, the following reports have survived.¹³

1. Bushrod Washington published two volumes of reports of cases in the Court of Appeals dating from 1790 to 1796. They were first printed in 1798 and 1799.
2. Daniel Call's *Reports* also cover the Court of Appeals. Volumes one and two systematically cover the years 1797 to 1800 and later; these two volumes were published in 1801 and 1802. Volumes three, four, and six contain a miscellaneous selection of cases dating from 1779 to 1800 and later; they were printed in 1805 and 1833.
3. John Brown, the clerk of the Court of Appeals, made reports of cases in that court covering the period 1791 to 1799. These were published in 1977 primarily for the benefit of historians.
4. George Wythe, the Chancellor of the High Court of Chancery, published reports of cases in his court dating from 1788 to 1799. The first edition was published in 1795 by Chancellor Wythe; the second edition was printed in 1852.
5. William Brockenbrough and Hugh Holmes reported cases in the General Court during the period 1789 to 1800 and later. These reports appeared in 1815.
6. Charles Lee's reports include cases from many different Virginia courts but not many cases from any single one. They date from 1784 to 1794 or 1795. They were printed along with Brown's reports in 1977.
7. James Hughes reported twenty-two cases from the Virginia Supreme Court for the District of Kentucky from 1785 to 1792. They were first published in 1803.

¹³ See generally, W. H. Bryson, *The Virginia Law Reporters Before 1880* (1977), and W. H. Bryson, *Miscellaneous Virginia Law Reports* (1992).

8. David Watson's reports include a few cases from the Louisa County Court and the Fluvanna County Court from 1799 and 1800 and five cases from the year 1800 in the District Court at Charlottesville. These were first edited and printed in 1992.
9. St. George Tucker compiled a series of reports of cases from the Court of Appeals and the General Court from the year 1786 to 1800 and later. They remain in manuscript form at the College of William and Mary in Williamsburg.

In addition, the following county court records have been transcribed and published.

10. *Boyd Crumrine* ed., *Virginia Court Records in Southwestern Pennsylvania: Records of the District of West Augusta and Ohio and Yohogania Counties, Virginia, 1775 - 1780* (1981).
11. *Marshall Wingfield* ed., *An Old Virginia Court: Being a Transcript of the Records of the First Court of Franklin County, Virginia, 1786 - 1789* (1948).

The following records and reports are copied in the companion volume to this work. For this edition, modern spelling and punctuation have been used.

Downman v. Downman (1791)

In the case of *Downman v. Downman* (1791), the defendant owed a debt to the plaintiffs; the defendant offered to pay the debt with paper money; the plaintiffs refused to accept the paper money because it was not legal money; the plaintiffs then sued in the Northumberland District Court for the debt; the defendant failed to respond within the time allowed by law; default judgment was entered against him; and the defendant then requested the court to set aside the default judgment and allow him to respond that he had offered to pay the debt. Then the plaintiffs argued that the default judgment in their favor should stand and this was for two reasons: (1) the defendant cannot respond with a plea of tender after an office (i. e. default) judgment and (2) when the paper money was tendered (i. e. offered), it was not legal money and they had no obligation to receive it in discharge of the debt. The Northumberland District Court refused to allow the defendant to respond late and ordered the debt to be paid. The defendant appealed to the Court of Appeals of Virginia, and this appellate court affirmed the decision of the lower court because the paper money tendered was not legal currency.¹⁴

¹⁴ Later proceedings in this case on another issue are reported in St. George Tucker's manuscript reports, vol. 1, p. 242 (1794), and at 2 Washington 189 (1796).

The record of this case is unusual in that the District Court Order of 3 April 1790 gives many, but not all, of the facts of the case. This was done only because the procedural posture of the case required that the proposed defense be copied into the record. Normally, the statement of facts taken from the proposed defense would not appear in any order of the court. It is also unusual in that the District Court put its reasons for its order into the order.

The other unusual thing about this case is that the Court of Appeals put its reason in its order. This was done after prodding from the lawyers and a tart reply from the presiding judge, as John Brown notes in his report of this case. But this little exchange makes it clear that the official orders in the order books did not normally include any reason which might have been given orally in open court.

The other motivation for transcribing this case is that it is one of only a very few which were reported by more than one reporter.

Turner v. Wright (1794)

In the case of *Turner v. Wright* (1794), the Halseys conveyed land to Stip, and Stip leased it to Wright. However, Turner was in possession of the land, and so Wright, asserting the rights of Stip, sued Turner in the Berkeley County Court to get possession of the land. Turner's defense was that Stip did not own the land because the deed of conveyance of the land from the Halseys to him was invalid because it was not properly recorded in the county clerk's office. The County Court agreed with Turner and refused to allow Wright to have a trial to prove his right to possession. Wright thereupon appealed to the Winchester District Court on the ground that, while the improperly recorded deed may have been invalid as against creditors and subsequent purchasers, it was valid against the Halseys, the sellers, and against Turner, a trespasser not claiming under the Halseys. The District Court agreed with Wright, the lessee, and reversed the County Court. Turner then appealed to the Court of Appeals of Virginia. The Court of Appeals affirmed the District Court, and the case was remanded so that Wright could have a trial to prove his case.

This case was chosen for publication because it was reported by more than one reporter. It is interesting to note that the lawyers for both parties on the second appeal and the clerk of the Court of Appeals were the three reporters of this case. Bushrod Washington, being the lawyer for the appellee, gave a particularly full report of the arguments of the attorneys.

Pickett v. Morris (1796)

In the case of *Pickett v. Morris* (1796), Pickett sued Morris in the Henrico County Court at common law for a debt. Morris offered to prove that he had a discount against the amount due to Pickett, but the County Court refused to allow him to prove it, and the jury gave its verdict for Pickett. Morris then sued in the High Court of Chancery in equity for an injunction to stay execution on the common law verdict and judgment because he was not allowed to prove his discount to the jury and for other procedural errors. The equity court ruled for Morris. Thereupon, Pickett appealed from the High Court of Chancery to the Court of Appeals because the discount should not have been allowed by the High Court of Chancery and because that court did not have jurisdiction to grant relief after the final judgment at common law.

After the Court of Appeals had heard the arguments of the lawyers on both sides, they adjourned to consider their judgment. They were troubled by the erroneous judgment of the common law court in denying the right of discount in Morris and by the procedural errors of the County Court and of the lawyers there, and they requested the appellate lawyers to reargue the point of the jurisdiction of the equity court. They did so having dredged up what English authority they could find, and the Court of Appeals thereupon affirmed the chancellor's interference in the matter because of the errors of law and procedure in the common law court. Thus do 'hard cases make bad law'.

Although it is the opinion of this author that this case was wrongly decided because the court of equity did not have sufficient grounds for jurisdiction, this case was chosen for inclusion because it discusses the boundaries of common law and equity jurisdiction. It is included also because it demonstrates the reliance of the Virginia lawyers and judges in the eighteenth century on English cases as precedents. Moreover, it is a thoroughly typical lengthy unofficial report with a very short and uninformative official court order.

As to the liberality of allowing the equity court to grant a remedy after the final judgment at common law, there are several points to be made. Even though the common law court was in error, the error should have been corrected upon appeal, and the common law judgment should have been *res judicata* until reversed on appeal. The Court of Appeals strains here the concepts of surprise and accident as a matter of the facts in this case in order to affirm the equity court's jurisdiction. The refusal of the common law court to correctly instruct the jury, grant a new trial, or sign the bill of exceptions was not, in this author's opinion, sufficient to justify the equity court's actions.

However, at that time in Virginia, the county courts and the Court of Appeals had both common law and equity jurisdiction, and thus there were no personal judicial rivalries in this regard. Nor had there ever been in Virginia; Coke and Ellesmere had died a long time ago a long way away.¹⁵ Moreover, the Virginia legal profession did not fear equity courts. The county courts were composed of lay justices, who were not highly regarded for their legal acumen by the professional bar and the appellate courts. In this case, they had given a clearly erroneous judgment. In this case, justice ultimately triumphed over the strict interpretation of the law of *res judicata* and the limits on equitable jurisdiction.

In fact, there was recent Virginia precedent for this. In the case of *Smith and Moreton v. Wallace* (1794),¹⁶ the Court of Appeals held as follows.

"The court are of opinion that the bail piece was sufficient and must have been so considered if it had been objected to, at the time it was offered. The clerk therefore mistook the law when he rejected it and entered a plea for the sheriff. That court might, and most certainly would, have corrected this mistake at any time if it had been moved to do so. But the party was ill advised when instead of doing this, he applied for a supersedeas to the judgment, since the record furnished a superior court with no ground for an interference.

However, we are fully satisfied upon the equity of this case. A more complete surprise can hardly be conceived. It would be strange if an accident so mischievous as this in its effects were beyond the reach of that court whose peculiar province it is to grant relief in such cases. The negligence with which the appellee is charged is fully excused by the agreement of the counsel and the mistake which followed and, therefore, cannot be urged as a ground for denying the relief which has been extended to him".

In the case of *Norton v. Rose* (1796),¹⁷ the Court of Appeals held that an equitable right could be asserted against a debt that had been assigned. Here, the debtor had had a common law judgment go against him before suing in equity to assert his equitable rights. The debtor should have removed the case to the equity side of the court by means of a common injunction before the final judgment. However, this issue of equity jurisdiction was mentioned by neither the lawyers nor the judges.

In the case of *Ambler v. Wyld* (1794),¹⁸ there was a suit in equity after a final judgment at common law. The plaintiff in equity was asserting that certain papers should not have been considered by the common law jury.

¹⁵ See 'Equity Reports and Records in Early Modern England' and the authority cited there, which is printed above.

¹⁶ 1 Washington 254; this case is also reported by John Brown at Miscellaneous Virginia Law Reports, p. 50.

¹⁷ 2 Washington 233 (1796).

¹⁸ Wythe's Reports 235, 2 Washington 36.

The equity judge, George Wythe, ruled that this was not a sufficient ground for equity jurisdiction, but since all parties had consented, he would and did hear the case.

In the case of *Cochran v. Street* (1791, 1792), after a verdict and final judgment at common law, four members of the jury said that they did not agree with the verdict but believed that they were bound by the vote of the majority and were unaware that the verdict must have been unanimous. The defendant at common law thereupon sued in equity in the same county court to have the common law execution stayed. An injunction was granted on the grounds that the false verdict was a surprise on the defendant that was not discovered until after the entry of the final judgment. (Surprise is a good ground for equitable jurisdiction.) This decree in equity was appealed to the High Court of Chancery, and Chancellor Wythe reversed the County Court and dismissed the bill in equity because the 'surprise' in this case was not sufficient.¹⁹ Upon a further appeal to the Court of Appeals, the High Court of Chancery was reversed, and the suit in equity was reinstated.²⁰ Edmund Pendleton, President of the Court of Appeals, held that "as to the unfairness of the trial on the score of surprise, there is no doubt, but that if it were proved, it would afford good ground for granting a new trial...".

In more recent times, the boundaries between common law and equity in reference to injunctions after final judgment at common law have been well defined. "The elements of this [suit for an injunction] in equity are (1) a [common law] judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law".²¹

The reference to fraud, however, is to extrinsic fraud only. Extrinsic fraud is fraud that is collateral to the issues before the court. Whether perjury and matters that go to the veracity of the evidence is extrinsic fraud on the court or whether this is intrinsic fraud to be decided by the trier of fact while weighing the evidence is a dispute that has been settled in favor of the latter definition. Otherwise, few judgments would be final because most litigants contest the truth of their opponents' evidence.²²

¹⁹ Wythe's Reports 133.

²⁰ 1 Washington 79.

²¹ *Charles v. Precision Tune, Inc.*, 243 Va. 313, 317-318, 414 S.E.2d 831 (1992).

²² *Rowe v. Big Sandy Coal Corp.*, 197 Va. 136, 143, 87 S.E.2d 763 (1955); *McClung v. Folks*, 126 Va. 259, 268-272, 101 S.E. 345 (1919).

An example of extrinsic fraud is the case of *O'Neill v. Cole*. In this case, a teenage infant was deceived by her father as to the contents of her uncle's will so that she did not defend her interests in the suit to settle the estate, in which she was a defendant. This was "extrinsic and collateral fraud which precluded her from presenting her true case and rights to the court for adjudication".²³

Fraud which produces false evidence is intrinsic fraud, but fraud which prevents the consideration of evidence is extrinsic fraud. An example of this distinction is where a condemnor withheld from the court and from the condemnee information showing that the proposed condemnation was for a private purpose so that the condemnee-defendant could not argue against the false allegations of the condemnor.²⁴

"[A] court of equity ... relieves against judgments at [common] law, not because they were wrong but because of some new matter, which the court of law did not, or could not, pronounce a judgment on, or which, for some just cause, the party could not bring to the consideration of the court of law".²⁵

²³ *O'Neill v. Cole*, 194 Va. 50, 57, 72 S.E.2d 382, 385 (1952). See also *Lee v. Baird*, 14 Va. (4 Hening & Munford) 453 (1809), where the defendant at common law was deceived into not making a defence.

²⁴ *Justice v. Georgia Industrial Realty Co.*, 109 Va. 366, 63 S.E. 1084 (1909).

²⁵ *Garland v. Rives*, 25 Va. (4 Randolph) 282, 316 (1826). Other examples of original bills after final judgment at common law are noted in *C. Robinson*, *Practice in the Courts of Law and Equity in Virginia*, vol. 2 (1835), pp. 212 - 222, and in *R. T. Barton*, *Pleading and Practice in the Courts of Chancery*, vol. 1 (1926), pp. 604 - 611.

W. H. BRYSON

Virginia Law Reports and Records, 1776 - 1800

**1. Rawleigh Downman, Jr. v. Joseph B. Downman,
John Chinn, and Rawleigh W. Downman, executors,
etc., of Rawleigh Downman, deceased (1791)**

I

Northumberland District Court Order Book No. 1, p. 52 (3 April 1790)

This day came the parties by their attorneys and the defendant¹ moved to set aside the judgment obtained in the office in this suit at rules and to plead in these words to wit "he defends the force, injury, and damages and whatever else he ought to defend when and where the court will consider thereof and says that the plaintiffs² ought not to have or maintain their said action thereof against him because he says that he the said defendant on the [blank] day of May in the year of our Lord one thousand seven hundred and eighty one at the parish and county in the declaration of the said plaintiffs mentioned was ready and then and there offered to pay to the said John Chinn the sum of fifty-three pounds Virginia currency, the sum promised in the bill obligatory in the said declaration mentioned to be paid as a just and principal sum together with all interest due thereon, and the said John Chinn then and there refused to receive the same, or any part thereof, in discharge of the said bill obligatory, and the said defendant on the same day and year last above mentioned was ready and at all times after was ready and yet is ready to pay to the said plaintiffs the said sum of money in the said bill obligatory mentioned as a principal sum aforesaid with all interest on the same day and year last above mentioned due thereon and the same here into court brings ready to be paid to the said plaintiffs if they, the said plaintiffs; will accept the same, all which the said defendant is ready to verify etc., wherefore he prays judgment of the said plaintiffs for the debt and damages aforesaid against the said defendant ought to proceed etc."

¹ Rawleigh Downman, Jr.

² Joseph B. Downman, John Chinn, and Rawleigh W. Downman.

On the motion of the plaintiffs, the court refused to admit the defendant to plead such plea because it comes now too late, being after [an] office judgment confirmed.

Secondly, it appears to the court that the money brought into court is what was once paper money but is not now money under any description.

Therefore, it is considered by the court that the plaintiffs recover against the said defendant the sum of one hundred and six pounds Virginia currency, the debt in the declaration mentioned, and their costs by them about their suit in this behalf expended and the defendant in mercy etc. But this judgment may be discharged by the payment of fifty-three pounds Virginia currency with legal interest thereon to be computed from the 24th day of August 1769 till the 24th day of August 1789 and the costs.

II

Northumberland District Court Order Book No. 1, p. 69 (9 April 1790)

On the prayer of the defendant by his attorney, an appeal is granted him to the Court of Appeals from the judgment obtained against him the third day of this term, he having with Mongo Harvey, his security, entered into and acknowledged a bond in the penalty of two hundred and forty pounds conditioned as the law directs.

III

1 Washington's Reports 26

This was an action of debt brought in the District Court of Northumberland by the appellees against the appellant. A conditional judgment being confirmed at the rules held in the clerk's office, the appellant moved the court for leave to set it aside and to file a plea in the following words, viz. "He defends the force, injury, and damages, when and where etc. and says the plaintiffs ought not to have or maintain their said action against him because he says that he the said defendant on the [blank] day of May 1781 at the county etc. was ready and then and there offered to pay to the said John Chinn" (one of the executors) "the sum of £53, Virginia currency, the sum promised in the bill obligatory in the said declaration mentioned to be paid as a just and principal sum together with all interest due thereon, and the said John Chinn then and there refused to receive the same, or any part thereof, in discharge of the said bill obligatory; and the said defendant on the same day and year last mentioned was ready, and at all times after was

ready, and yet is ready, to pay to the said plaintiffs the said sum of money in the said bill mentioned as a principal sum assumed with all interest on the same day and year last above mentioned due thereon, and the same here brings into Court ready to be paid to the said plaintiffs, if they will accept the same, and this etc."

On the motion of the plaintiffs, the Court refused to admit the defendant to plead such a plea because it was then too late, being after office judgment confirmed, secondly, because it appears to the Court, that the money brought into court is what was once paper money but is not now money under any description.

Judgment [was given] for the debt in the declaration mentioned to be discharged by the payment of £53 with legal interest from the 24th of August 1769 till the 24th of August 1789 and costs.

From this judgment, the defendant appealed.

The President³ delivered the opinion of the Court.

There are two points to be considered in this case: first, whether an office judgment can be set aside in order to let in the plea of tender, and secondly, whether it ought to have been set aside upon this particular plea in the form in which it was offered to the court.

The first point depends upon the correct exposition of the 28th section of the District Court law, which declares that "every judgment entered in the office against a defendant and bail, or against a defendant and sheriff, shall be set aside, if the defendant at the succeeding court shall be allowed to appear without bail, put in good bail, being ruled so to do, or surrender himself in custody, and shall plead to issue immediately".⁴ These words, plead to issue immediately, are the same as were used in the old act of 1753,⁵ for establishing the General Court, under which the practice of that court was very liberal in allowing a defendant to plead that which did not make an issue but required subsequent pleadings, provided the real justice of the case, and not an intended delay, was thereby promoted. This is unavoidable in cases of bonds with collateral condition, where the defendant cannot plead to issue. This is also agreeable to the principle laid down by Lord Holt in 2 Salk. 622.⁶ "That though a judgment be ever so regularly entered, it shall be set aside at any time on payment of costs, so as the plaintiff does not lose a trial". The words of the new law, constituting the

³ Edmund Pendleton (1721 - 1803).

⁴ Act of October 1788, chapter 67, § 29, *W. W. Hening*, Statutes at Large of Virginia, vol. 12, pp. 741 - 742.

⁵ Act of November 1753, chap. 1, sect. 18, *Hening's Statutes*, vol. 6, p. 332.

⁶ *Giles v. Hart*, 2 Salkeld 622, 91 English Reports 526 (K. B. 1697).

General Court, are the same as those used in the old law. What has been the practice under this law I do not know.

A difficulty arises with respect to the plea of tender, not only from its not making an issue, but as that necessary part of it, of having been always ready, is said to be inconsistent with his taking an imparlance and in this case with his failing to appear and plead.

I confess that I cannot discover any sound reason for this doctrine. An imparlance is intended to gain information of the real subject of the suit, which when the defendant finds to be for a debt which he had tendered, he may know he has always been ready to pay it. Nor do I see clearly what is meant by the plaintiff's granting an imparlance, which, the books say, shall preclude him from the objection.

However that may be, a judgment by default, since it may be entered for want of special bail under the Act of Assembly, which the defendant may not have it in his power to give, does not imply a tardiness as an imparlance does nor make the reasoning (such as it is), which rules in that case, apply in this.

I find in a book entitled 'Practice in Common Pleas' in the time of King William, page 134,⁷ this case. After a rule for time to plead an issuable plea, a plea of tender and refusal was offered, but the plaintiff signed judgment, which was held good, such a plea not being considered as an issuable plea. This is a strong and pointed case, but in *Stra.* 836⁸ and 1 *Ld. Ray.* 254,⁹ a plea of tender and refusal is considered to be an issuable plea.

Considering the circumstances of this country and the dispersed situation of the attorneys and their clients, who can seldom communicate with each other but at court, justice seems to require a relaxation in these rules of practice. It would seem to me proper to allow a discretion in the judges to admit any plea which appears necessary for the defendant's defense and only to resort to the rigor of the rule where delay appears to be intended.

However, it is unnecessary to decide this point in the cause, since the court is of opinion that upon the second point, the plea was properly disallowed.

The plea is bad in form for the following reasons, first, that the day of the tender is left blank, second, instead of computing the interest to that day, adding it to the principal, and saying that he offered a sum certain, he pleads that he offered the principal £53 and all interest due thereon.

Thirdly, the plea is always ready from the time of the tender, which was twelve years after the day when the money was payable, instead of plead-

⁷ *Davershill v. Barret*, *Cooke* 134, 125 *English Reports* 1005 (C. P. 1736).

⁸ *Cox v. Robinson*, 2 *Strange* 1027, 93 *English Reports* 1011 (1736).

⁹ *Giles v. Hartis*, 1 *Lord Raymond* 254, 91 *English Reports* 1066 (K. B. 1697).

ing it from the time when payment should have been made. 1 Ld. Ray. 254. But the plaintiff might have demurred for these causes, and of course the want of form in the plea did not afford a sufficient cause for rejecting it.

But the ground upon which the plea was refused, we consider to be a proper one; it was that the paper brought into court was not money then.

A plea of tender offered at any time at rules or in court ought not to be received unless the money tendered accompanies it; if it do not, the plaintiff may sign judgment. 2 Barn. 296.¹⁰ It must be money current at that time, otherwise it is not money at all. There was no paper current as money in April 1790, when this plea was offered.

This is a case where a sort of money was declared by law to be a legal tender and which during the period of its legal existence was tendered, but its currency ceased before the plea pleaded. In this respect, the case struck me, upon the former argument, to be uncommon in its nature and worthy of mature consideration, since upon legal principles, such tender ought to be supported, whether the law accorded with justice and policy, or not. It occurred to me at that time that the plea ought to state the sort of money tendered, that the defendant was always ready to pay that very money which he brings into court. Then upon a demurrer, which would admit the fact, it might be decided upon the law at the time of the tender, independent of the subsequent alteration in its nature and currency. Since the former argument, I have looked into the cases upon this subject and found a quotation, in Viner's *Abridgment*, xx, 177, from Davis' Rep. 28 and Dy. 822,¹¹ which seems apposite to that opinion.

In debt on a bond for £24 payable at two installments, defendant pleads that on the day when the first installment became due, a certain money called Pollards was current in lieu of sterling and that on the day he tendered a moiety of the debt in the said money called Pollards which the plaintiff refused to accept, and that he is uncore prist etc. and brings it into court; and because the plaintiff did not deny it, it was awarded that he recover one moiety in Pollards and the other in pure sterling. So in the case of a fall in the value of shillings, a tender of them was specially pleaded and the shillings were brought into court, and the plaintiff obliged to accept them, at the value when tendered, without damages or costs. Davis 27.¹²

¹⁰ *Davenhill v. Barritt*, Barnes 337, 94 English Reports 943 (C. P. 1736), vide supra, or perhaps *Straphon v. Thompson*, Barnes 281, 94 English Reports 916 (C. P. 1738).

¹¹ *The Case of Mixed Moneys*, Davis 18, 27, 80 English Reports 507, 515 (1604); *Barrington v. Potter*, Dyer 81, 73 English Reports 176 (1553).

¹² *The Case of Mixed Moneys*, Davis 18, 27, 80 English Reports 507, 515 (1604).

Wade's Case, 5 Reps. 114,¹³ does not apply, because the Spanish money was current by proclamation, and besides, when the tender was objected to, English money was procured and tendered.

The present plea makes no particular case, it alleges a tender of money generally and that the defendant was always ready to pay the said sum of money (not the said kind of money) and brings it into court. It was therefore incumbent upon the defendant to bring into court that which was money at that time, which the paper bills were not.

The judgment therefore must be affirmed; it is entered wrong in stopping interest at the end of twenty years, but this is not material, since if it had been rightly entered, the defendant might pay the penalty and costs.

IV

Miscellaneous Virginia Law Reports, p. 15 (Charles Lee's Reports)

An appeal. The common bail entered himself as special bail and offered a plea of tender which did not state the sort of money nor the quantity of debt. The court refused the plea first because the plea was after [an] office judgment [and] secondly that the bills tendered as money were not current as money at the time of the tender.

Campbell¹⁴ for [the] appellant contended that, after [an] office judgment a tender cannot be pleaded and cited 1 Burrow and Eq. Ca. Abr.¹⁵ Secondly [he said] that the court cannot notice the thing tendered because that was a subject fit for a jury. 5 Rep. 114.¹⁶ A defendant is not bound to receive money tendered.

Curia. The Act of Assembly¹⁷ allows only pleas to issue immediately. But this Act should be liberally construed and any plea should be received which being put in issue will decide the cause according to its merit or justice. Where a bond has a collateral condition the plea of condition performed is usually allowed though it makes other pleadings necessary. A tender may be pleaded after imparlance. Str. 136,¹⁸ T. Raym. 254.¹⁹

¹³ 5 Coke's Reports 114, 77 English Reports 232 (C. P. 1601).

¹⁴ Alexander Campbell (d. 1796).

¹⁵ Perhaps Kilwick v. Maidman, 1 Burrow 59, 97 English Reports 189 (K. B. 1757), and Austen v. Executors of Dodwell, 1 Equity Cases Abridged 318, 21 English Reports 1073 (Ch. 1729).

¹⁶ Wade's Case, 5 Coke's Reports 114, 77 English Reports 232 (C. P. 1601).

¹⁷ Act of October 1788, chap. 67, sect. 29, *Hening's Statutes*, vol. 12, pp. 741 - 742.

¹⁸ Cox v. Robinson, 2 Strange 1027, 93 English Reports 1011 (1736).

¹⁹ Giles v. Hartis, 1 Lord Raymond 254, 91 English Reports 1066 (K. B. 1697).

But the judgment ought to be affirmed because the plea tendered was in itself bad.

First. It was blank.

Secondly. It states the principal sum and not the interest leaving that to future computation.

Third. The sort of money should be stated in the plea that it might be in the power of the plaintiff to demur to it if he pleased. *Davis' Reports*.²⁰ Money is a legal question determinable by a court, what it is, and not by a jury.

Whether the thing tendered as money should be current as such at the time of the plea is questionable, but that in this case need not be decided.

[The] judgment [was] affirmed.

V

Miscellaneous Virginia Law Reports, pp. 27, 28 (John Brown's Reports)

June 10th 1791. [There was an] appeal from an office judgment in [the] District Court which the appellant offered to set aside on the third day of the District Court by filing a plea of tender, which plea was refused. The court here said that any plea after [an] office judgment by which, when an issue at law or in fact is made up, an end will be wholly put to the dispute ought to be received, but this plea {of tender} the court below were right to refuse, for the second reason assigned by them.

{To wit because the money brought into Court is what was once paper money but is not now in April 1790 money under any description. See [the] reason (as entered in order book) in next page.}

[The] judgment [was] affirmed.

When about to enter the judgment, the judge presiding in Court, upon being asked, said that when the Court wished a reason for their judgment to be entered on [the] record they would direct it to be done.

{But in this case, though an affirmance, the Court at the reading of the orders had this reason, "The Court having properly refused the plea upon the second reason" interlined after the words "no error in the said judgment".}²¹

²⁰ The Case of Mixed Moneys, *Davis* 18, 28, 80 *English Reports* 507, 516 (1604).

²¹ The words within angle brackets were added to the manuscript by William Green (1806 - 1880).

VI

Court of Appeals Order Book No. 2, p. 69 (8 June 1791)

These causes were this day heard upon the transcripts of the record and the arguments of the counsel on both sides; but because the Court are not yet advised of their judgments to be given in the premises, they take time to consider thereof.

VII

Court of Appeals Order Book No. 2, p. 72 (10 June 1791)

Upon an appeal from a judgment obtained by the appellees against the appellant in the District Court held at Northumberland Courthouse the third day of April 1790 for one hundred and six pounds Virginia currency and the costs but to be discharged by the payment of fifty-three pounds Virginia currency with legal interest thereon from the 24th day of August 1769 till the 24th day of August 1789 and the costs,

This day came the parties by their counsel, and the Court, having maturely considered the transcript of the record and the arguments of the counsel, are of opinion that there is no error in the said judgment the Court having properly refused the plea upon their second reason. Therefore, it is considered that the same be affirmed and that the appellees recover against the appellant damages according to law for retarding the execution thereof and their costs by them about their defence in this behalf expended,

Which is ordered to be certified to the said District Court.

VIII

Northumberland District Court Order Book No. 1, p. 151 (2 September 1791)

The transcript of the record of the judgment of the Court of Appeals pronounced on the tenth day of June last past being laid before the Court in these words "This day came the parties by their counsel, and the Court, having maturely considered the transcript of the record and the arguments of the counsel, are of opinion that there is no error in the said judgment the Court having properly refused the plea upon their second reason; Therefore, it is considered that the same be affirmed and that the appellees recover against the appellant damages according to law for retarding the execution thereof and their costs by them about their defence in this behalf

expended", whereupon it is considered that the same be made the judgment of this Court.

2. Thomas Turner v. John Wright, lessee of John Stip (1794)

I

Winchester District Court Order Book No. 1, p. 513 (24 April 1793)

Upon an appeal from a judgment of the Court of Berkeley County recovered by the appellee against the appellant on the third Tuesday in August 1790 whereby it was ordered that the appellee recover against the appellant his costs by him expended in the defense of the said suit and that the said appellant for his false clamor be in mercy etc., this day came the parties by their attorneys and thereupon the transcript of the record of the judgment aforesaid being seen and inspected, it seems to the Court here that the said judgment is erroneous in this that the said County Court did not admit as evidence to the jury the instrument of writing indented with the endorsements thereon purporting to be a deed from Benjamin Halsey and Sarah, his wife, and Margaret Halsey to the appellee for the lands in question and the witness offered in support thereof. Therefore it is considered that the same be reversed and annulled and that the appellant recover against the appellee his costs by him expended in the prosecution aforesaid here, and it is ordered that all proceedings had in the said suit in the said County Court subsequent to the issue be set aside and that the said cause be retained here for trial, from which judgment the appellee prayed an appeal to the next Court of Appeals and having given bond and security to prosecute the same according to law, appeal is allowed [to] him.

II

1 Washington's Reports 319

This was an ejectment brought by Stip in the County Court of Berkeley. The plaintiff at the trial offered in evidence in support of his title a deed from Benjamin Halsey and wife and Margaret Halsey to him dated in June 1785, to which deed is annexed a certificate of two persons who stile themselves justices of the peace for the District of Camden in South Carolina, stating that the three subscribing witnesses to the deed had declared upon oath made before them as justices aforesaid that they saw the grantors sign, seal, and deliver the said deed to the said Stip as and for their act and deed.

That upon this certificate, the deed was admitted to record in Berkeley County Court where the land was situated on the 19th of July in the year 1785. The plaintiff also produced upon the trial a witness to prove the execution of the deed. The defendant objected to the evidence of the deed because it had not been theretofore legally proved and legally recorded and to the testimony of the witness because it was improper to prove the execution of the deed by *one witness only* at that time. The court rejected the evidence of the deed, as well as of the witness, to which the plaintiff excepted. A verdict and judgment was given for the defendant from which the plaintiff appealed. The District Court reversed the judgment of the County Court, from which the defendant appealed to this court.

Lee²² for the appellant. First, I shall insist that the deed in question, not having been legally recorded, is void. The Act of 1748, 1st Geo. II, c. 1,²³ declared that no estate of inheritance shall pass, alter, or change from one to another unless by deed indented, sealed, and recorded, within a particular time, upon the acknowledgment of the parties to the deed, or upon proof of the execution thereof by three witnesses. By the Fourth Section of the law, the deed is declared to be void as to all creditors and subsequent purchasers unless the same be recorded according to the directions of the Act. As to persons residing out of this state, that law provides no mode for proving deeds made by them different from that which is prescribed as to residents. But the Act of October 1776, c. 16,²⁴ permits the deeds of nonresidents to be recorded upon a certificate of two magistrates that the deed was acknowledged before them or proved by the oaths of three witnesses with the testimonial of the governor of the state where the deed is so proved that the persons giving the certificate are magistrates. Now in this case, their being no such certificate by the governor, the deed ought not to have been admitted to record and therefore is now to be considered as an unrecorded deed and therefore void. For the Act of 1748 declares all deeds, not recorded according to the directions of the act, void, except as between the parties or those claiming under them, and the parties to this suit do not appear to be within the exception.

But secondly, if the deed be not void, still the evidence produced at the trial to prove its execution was insufficient. The certificate of the probate in [South] Carolina is not to be regarded as evidence at all as the persons receiving the probate do not appear judicially to this court to have been magistrates agreeably to the Act of Assembly, and consequently, the deed has obtained no additional authenticity by having been admitted to record

²² Charles Lee (1758 - 1815). He was Attorney General of the United States from 1795 to 1801.

²³ Act of 22 George II, *Hening's Statutes*, vol. 5, p. 408.

²⁴ *Hening's Statutes*, vol. 9, p. 207.

in Berkeley [County] Court. To obviate this difficulty, the plaintiff produced one witness to prove the execution of the deed; to which there are two objections: first, that one witness was not sufficient, the law of 1748 above referred to requiring three, second, if one witness were sufficient, yet he ought to have been a subscribing witness, and from this record, it does not appear that he was, or if a subscribing witness could be dispensed with, it could only be by proving that they were all dead, or could not be procured, and this should have been stated upon the record. ¶ Washington²⁵ for the appellee. The first point in this cause depends upon the true exposition of the Act of 1748, which has been read. The First and Fourth Clauses must be considered together. The first declares that "no estate of inheritance, or any estate for life, shall pass, alter, or change from one to another by deed unless the same be made in writing, indented, sealed, and recorded in manner following", etc. And then it goes on to limit the time of recording the deeds of residents, and of non-residents, and concludes with declaring, that "no such deed shall be admitted to record unless the same be acknowledged in court by the grantor, to be by his act and deed, or else that proof thereof be made in open court by the oath of three witnesses".

The Fourth Clause declares that "all such deeds shall be void as to all creditors and subsequent purchasers unless they be acknowledged or proved and recorded *according to the directions of this act*, but the same, as between the parties, shall nevertheless be valid and binding".

Now the true construction of the clauses taken together seems to be this. To pass a freehold interest, the deed must be recorded, and to give it validity against creditors and subsequent purchasers, the deed must also be recorded *according to the directions of the act*; that is to say, upon the acknowledgment of the grantor or proof by three witnesses, within eight months, in the cases of residents, and within two years in those of non-residents. But in all cases except where creditors and subsequent purchasers are concerned, though the deed must be recorded, it need not be recorded *according to the directions of the act*. The reason of the distinction is apparent. As between the parties or those claiming under them, it is of little consequence, how, or when the deed be recorded, but it is highly important as to creditors and purchasers, who may be affected *by relation* to the date of a deed, though it be not recorded until after they had given credit or made the purchase.

In this case then, the deed in question was recorded, though not according to the directions of the act, and is valid under the Fourth Clause, the defendant below not appearing to be a subsequent purchaser or creditor.

²⁵ Bushrod Washington (1762 - 1829). He was a Justice of the United States Supreme Court from 1798 to 1829. (He was also the compiler of these reports of cases.)

If this be the true exposition of the law, the deed must be considered as valid, and if so, the second objection cannot be maintained. Three witnesses are necessary to prove a deed, to entitle it *to be recorded*, and therefore, I admit that the deed itself, or a copy *certified to have been proved by less than* that number of witnesses, could not be received as evidence in any court, because if this sort of evidence, which the statute authorizes, be resorted to, the statute must be pursued. But surely *the proof of the deed at the trial* by one witness is as good as if it had been proved by twenty. For at common law, one witness would be sufficient to prove the execution of a deed, and the Act of 1748, which requires three, relates entirely to the proof necessary to *admit the deed to record*, and not to the evidence necessary in legal trials.

As to the objection to the witness himself, it admits of two answers: first, that if he were not a subscribing witness, yet it is no good objection to his testimony, the law not requiring the witnesses to a deed to subscribe their names, as the statute respecting wills does, and this will account for the necessity of producing the subscribing witnesses to prove a will. Secondly, it is not sufficient to suggest possible exceptions to the witnesses, but they should appear to be stated upon the record. It is the business of the appellant to state and also to prove the ground of his objections, and it is not incumbent upon us to show that the witness was properly admitted, since this will be presumed until the contrary appears.

The President.²⁶ Upon the first point, the court are of opinion that the deed offered in evidence was neither legally proved nor legally recorded under the Act of 1776, c. 16, because it wanted the governor's testimonial that the persons who certified the probate were magistrates. The court below would therefore have done right in rejecting this as a *recorded deed* in support of the plaintiff's title. But since by the Act of Assembly passed in the year 1748, such deeds, though not recorded, are valid between the parties, though void as to creditors and subsequent purchasers (neither of which the defendant is stated to have been), the actual execution of the deed was a fact which the plaintiff was at liberty to prove, as in other cases by evidence satisfactory to the jury, whether it were by one or more witnesses.

As to the objection, that the witness does not appear to have been a subscribing witness and that none other could properly be admitted, the answer is that the Act does not require the three witnesses to a deed to subscribe their names as in the case of wills. But another sufficient answer to the objection is that it does not appear that he was not a subscribing witness nor that the subscribing witnesses might not have been proved to be dead.

²⁶ Edmund Pendleton (1721 - 1803).

The court improperly stopped the examination, and therefore, the District Court rightly reversed the judgment.

III

Miscellaneous Virginia Law Reports, p. 23
(Charles Lee's Reports)

An appeal to the Court of Appeals.

By the Act of 1748,²⁷ a deed is good between the parties though never recorded and the execution of the deed may be proved before a jury, as any other fact by one witness. Refusing this testimony was error in the County Court, and their judgment was for this properly reversed by the District Court, whose judgment is affirmed here.

IV

Miscellaneous Virginia Law Reports, p. 52
(John Brown's Reports)

A deed admitted to record without proper proof was not considered as recorded and adjudged to be void as to creditors and subsequent purchasers but to be a good deed as between the parties and their heirs in this case, no creditors or subsequent purchasers being interested.

V

Court of Appeals Order Book No. 3, p. 16 (27 October 1794)

Upon an appeal from a judgment of the District Court held at Winchester, this day came the parties by their counsel and thereupon the transcript of the record of the judgment aforesaid was seen and inspected, but because the Court here is not yet advised of the judgment to be given in the premises, they take time to consider thereof.

²⁷ *Hening's Statutes*, vol. 5, p. 410.

VI

Court of Appeals Order Book No. 3, p. 18 (28 October 1794)

Upon an appeal from a judgment obtained by the appellee against the appellant in the District Court held at Winchester the twenty-fourth day of April 1793 reversing with costs a judgment recovered against the appellee by the appellant in the Court of Berkeley County in August 1790 whereby it was considered that the appellee should take nothing by his bill but for his false clamor be in mercy etc. and that the appellant should go thereof without day and recover against the appellee his costs and also from an order of the said District Court whereby it was ordered that all proceedings had in the said suit in the said County Court subsequent to the issue joined should be set aside and that the said cause should be retained in the said District Court for trial,

This day came the parties by their counsel, and thereupon the transcript of the record of the judgments and order aforesaid having been maturely considered, the Court is of opinion that there is no error in the judgment and order aforesaid of the District Court. Therefore, it is considered that the same be affirmed and that the appellee recover against the appellant damages according to law for retarding the execution thereof and his costs by him about his defense in this behalf expended,

Which is ordered to be certified to the said District Court.

3. George Pickett v. Richard Morris (1796)

I

2 Washington's Reports 255

In the year 1785, Morris purchased from Littlepage the moiety of two thousand acres of land in Kentucky at the price of £600 and give his bond for £400 payable at a future day and a note of hand for £200 which has been discharged. Johnson had an equitable title to the other moiety of this land, under a former contract, but upon this condition that he should allow Littlepage, or those claiming under him, to take choice of either of the two tracts on paying the difference in value between them. In 1786, Littlepage assigned this bond to Stockdell, at which time Morris was a creditor of Stockdell by bond in a sum very little short of the amount of the one which he had given to Littlepage. Stockdell proposed a discount of the two bonds to Morris, which the latter refused, in consequence of the pendency of a suit against him, Littlepage and others by Johnson in the State of Kentucky,

claiming a conveyance of an undivided moiety of the 2000 acres of land instead of a separate tract with the difference in value between such tract and the first choice which Morris by his contract with Littlepage had a right to make. After this refusal, Morris instituted suit against Stockdell upon his bond and recovered a judgment. Stockdell assigned Morris' bond to Pickett, but whether before or after the judgment obtained by Morris does not certainly appear.

Pickett instituted a suit upon this bond against Morris in the County Court of Henrico. At the trial of that cause, the counsel of Morris offered Stockdell's bond as a discount and moved the court to instruct the jury upon the law arising from the facts in evidence before them or by other means to reserve the points for their future decision and for this purpose tendered a statement of the facts, requesting the court to alter them if necessary so as to reserve the case. The court declined or neglected giving any opinion upon either point.

The legality of the discount, the equity of Morris against the bond in question, and the subject of notice to Pickett of both or either of those objections were subjects discussed before the jury, and the court refusing to interfere, they found a verdict for Pickett, the plaintiff at law.

The defendant Morris moved for a new trial (this being the second trial of the cause), but the court were divided in opinion. Afterwards, a fifth magistrate who had sat during the trial came upon the bench, and the motion was renewed but was soon afterwards dropped. The defendant then exhibited a bill to the same court praying for an injunction at which time Pickett agreed to stay execution for a month that the defendant might have an opportunity of applying to the Chancellor for an injunction which he afterwards did.

Morris filed his bill in the High Court of Chancery praying to be relieved against this judgment principally upon the ground of the debt due to him from Stockdell, which had not been allowed him as a discount in the trial at law.

Pickett, in his answer to this bill, states himself to have been a fair, bona fide purchaser of the bond in question, without notice of any disputes relative thereto, or of the appellee's right to any discounts, that he paid Stockdell for the said bond, in money certificates and other public securities, a sum exceeding the value of this bond, which excess created a debt from Stockdell to him, which has been considerably increased by other advances.

Whether the County Court refused to grant the injunction applied for by Morris, or whether the motion was withdrawn in consequence of the offer made by Pickett, of staying execution for a month, does not certainly appear from the record.

One witness proves that the appellant applied to him to know what objection the appellee had to the payment of this bond; the witness informed him that the appellee had discounts against it and also mentioned the dispute about the Kentucky land, upon which the appellant replied, "that he would have nothing to do with the bond". The witness does not state whether this conversation took place before or after the assignment but concludes from Pickett's reply that it was prior to it. It does not appear when the assignment was made. The High Court of Chancery, upon a hearing of the cause, dissolved the injunction as to £36.13.3, with interest thereupon from August 1786, after deducting therefrom the costs of that court and decreed the injunction to stand and be perpetual as to the residue and that Morris should assign to Pickett the judgment obtained by him against Stockdell; the bill as to Littlepage was dismissed with costs.

From this decree Pickett appealed.

Marshall²⁸ for the appellant. The first question which I shall consider is, whether the appellant could at law have set up his judgment against Stockdell as a discount against the appellant. Secondly, whether he can resort to a court of equity for the relief sought for by this bill.

First. The assignee of a bond, by the law of this state, is bound to allow all just discounts against himself or against the obligee before notice of the assignment. The discount offered by the appellee is a judgment obtained against a mesne assignee, which I contend is not a case provided for by the Act of Assembly.²⁹ Morris' bond, coming by assignment into the hands of Stockdell, could not be considered as being ipso facto discharged, in consequence of the latter being the debtor to the former to an equal amount. The reciprocal possession of each others' bonds did not amount to a payment of both or of either. The one may be discounted against the other unless the conduct of the parties has prevented it.

This is the difference between the actual payment and off-setting mutual demands; in the first, the bond, is discharged by the silent operation of law; in the latter, both debts subsists until they are opposed to each other; for the parties may waive the discount if they please.

In this case, Morris evinced his determination not to discount, expressly as well as impliedly. He refused it expressly when Stockdell applied to him for that purpose and impliedly by bringing suit against Stockdell upon his bond in which, if the discount had been offered, he must have been

²⁸ John Marshall (1755 - 1835). He was Chief Justice of the United States Supreme Court from 1801 to 1835.

²⁹ Act of Oct. 1786, chap. 68, *Hening's Statutes*, vol. 12, p. 359; Virginia Code, chap. 29, § 4 (1792).

nonsuited. And Stockdell by assigning Morris' bond to Pickett evinced a similar disposition in himself not to discount.

After this, will it be contended that Morris can reclaim his right of discounting and that too against a bond fide assignee? But suppose Morris was not deprived of this right by his own conduct, let us consider.

Secondly, whether he can be relieved in this court.

Every point in this cause has once been before a court of competent jurisdiction, and without a possible objection to the fairness of the trial, the jury have decided in favor of the appellant. If the County Court gave an erroneous opinion upon the points submitted to them, or if they erred in refusing to give any opinion at all, the power of correction belonged exclusively to an appellate court. But a court of equity has no jurisdiction in such a case. It cannot correct legal errors in an inferior court or rehear and rejudge the judgment of a court of law. If Morris was aggrieved by the judgment of the County Court, he might have excepted and appealed. If the justices refused to sanction the bill of exceptions by their signature, the law marks out a plain redress for the injured party. But instead of pursuing those steps, the appellee voluntarily abandons them and now seeks relief in a court of equity upon the very points which had been fully discussed and fairly decided upon in a court of law. If he can hope to succeed, it must not be by asserting the law to be in his favor for that has been determined against him by the proper tribunal, and therefore, the law is with his antagonist until that decision be reversed. He must then rely altogether upon his claim to superior equity.

Let the pretensions of the two parties upon this ground be compared. Pickett is a fair purchaser, for a valuable and full consideration, without notice of any objection upon the part of Morris. On the other hand, Morris had by his own conduct completely discharged the bond in question from the danger of being discounted against the debt due from Stockdell to him. He refused the discount as one of the depositions proves for the unfair purpose of discharging his own bond in warrants, at a reduced price, and consequently for less than the real amount. He institutes suit against Stockdell as an additional evidence of his having disclaimed the discount, after which his bond is assigned. Can he now talk of equity who by his own conduct has been the cause of the very loss he is unwilling to bear himself and now seeks to throw upon Pickett? If he had done at that time what he now insists upon, the bond in question would long since have been cancelled and deprived of its ability to deceive the world.

Perhaps the attempt may be made to excuse this conduct of Morris on account of the equity against his bond which is faintly relied upon in the bill. If this had been anything more than a pretence, Morris instead of

waving the discount by bringing suit upon Stockdell's bond would have instituted a suit in equity to be relieved against the payment of his bond, by which means third persons would have been warned not to purchase it. But the decree of the Chancellor by directing the difference between the two bonds to be paid by Morris necessarily disallows his claim of equity on account of the Kentucky lands.

I say nothing about the bill of exceptions because, not being signed, it contains no facts which this court ought to regard.

Wickham³⁰ for the appellee. I cannot agree that Morris has by any part of his conduct waived his right of discounting Stockdell's bond against his own or that he is precluded from asserting that right, as well as his prior equity against this bond, in a court of chancery.

Morris purchased from Littlepage his choice of two distinct tracts of land of a thousand acres each. He is afterwards sued in the State of Kentucky by Johnson who claims an undivided moiety of both tracts. Should he succeed, no two contracts can be more unlike than the one made with Littlepage and that which would be thus forced upon him. The bond which he had given in part of the purchase money comes by assignment into the hands of Stockdell, his debtors, charged with this equity against it, and therefore, when Morris was applied to by Stockdell to discount one bond against the other, the former very properly objected. He was not bound to offset a debt justly due to him against one which in equity he did not owe. Under this impression, Morris brought suit upon Stockdell's bond as he certainly had a right to do.

It cannot be denied that Morris had originally an equity against Littlepage, but it was not necessary for him to disaffirm the contract unless he pleased to do so for if the damages to which he was entitled should be equal to the debt due from him to Littlepage, the one would discharge the other, and yet the contract remain valid.

The next question then is whether Morris can in a court of chancery set up this equity, as well as the discount against Pickett, the assignee. As this point has been fully discussed in the case of *Norton and Rose*,³¹ it will not be necessary to repeat those arguments.

But it is contended that cross bonds do not discharge each other; that they only give an election to discount, the one against the other. This position may be very questionable. The words of the law are general enough to make any discount a payment. But if this be not the case, Morris may offer Stockdell's bond as a discount against Pickett because it would have been a

³⁰ John Wickham (1763 - 1839).

³¹ 2 Washington 233 (1796).

good one against Stockdell. The time when the discount may be made is not limited by the law and, therefore, may properly be offered when payment is demanded. The conduct of the parties in the meantime cannot defeat this right to discount unless it amount to an express waiver. I have endeavored to prove that the refusal of Morris did not amount to a waiver. On the other hand, he retains Stockdell's bond in his possession, and as soon as he was properly called upon by Pickett's suit to make his election whether to discount or not, he then offered Stockdell's debt as an offset. The institution of the suit upon Stockdell's bond was not an implied waiver; by giving to the debt the security and dignity of a judgment, he did not thereby render it unfit to be made an offset.

But it is contended that however the general question may be decided, a discount against a mesne assignee cannot be set up against the plaintiff in the action. I can see no good reason for this distinction; if it be correct, it is apparent that the most palpable injustice must follow. The obligor, knowing that his bond has come by assignment into the possession of a particular person, goes on to sell him property or to make payments. Will it be contended that a subsequent assignment of the bond will discharge it of those discounts which had once fairly attached upon it?

If we must give to the law a construction so strict as to produce this effect, it will follow from the same mode of interpretation that the negotiability of a bond is at an end after one assignment, and of course, that Pickett could not recover at law. The words of the law are "that any person or persons may assign", which if taken strictly, will only apply to obligee or obligees. But if under a liberal construction of the law, assignees may assign, the proviso as to discounts must be so far extended in its interpretation as to be commensurate with the right to assign.

The next question is whether we can be assisted in a court of equity after what has happened in the trial at law?

It is objected that the errors which the court committed were only examinable by a court of appellate jurisdiction. But in the case of *Ambler and Wyld*,³² this court determined that the Chancellor might relieve against a mere error in the court of law. In that case, the court improperly refused to admit certain testimony which was offered; the party aggrieved by that decision might have excepted and appealed, but he did not. Your honors determined that the inferior court were wrong in refusing the evidence and that the party who was injured by the mistake of his counsel in not excepting might seek relief in equity. But this is a much stronger case than that. We do not complain of an erroneous opinion given by the court but that

³² 2 Washington 36 (1794); the chancellor's opinion is printed in Wythe's Reports 235 (1793).

they refused to give any opinion at all when applied to for that purpose. Instead of instructing the jury as to the law, they left a question of nicety and difficulty to be decided upon by them. If the jury undertook to determine upon a question which involved equitable matter and were wrong in their opinion, surely their decision does not oust the court of chancery of its jurisdiction over the subject. It is obvious that the counsel for Morris were misled, and the jury confounded by an enquiry into Morris' equity against the bond and Pickett's knowledge of it before the assignment; whereas the single point to which the attention of the jury ought to have been directed was the propriety of discounting the bond due from Stockdell. As to the notice, the jury had nothing to do with it; it was a merely equitable question. The defendant was prevented from obtaining a new trial, from a mere accident, which it was not in his power to control. It is every day's practice for the Chancellor to relieve against an injury resulting from a mistake of counsel; as where he neglects to offer discounts and the like.

Having, I trust, established the jurisdiction of the court of equity. I will proceed to examine the facts in this cause and apply them to the principles which I have endeavored to maintain.

If Stockdell had been the plaintiff at law, no question would exist as to our right to relief against him. It will also be conceded that whether the equity goes along with the bond into the hands of an assignee or not, he is liable if he had notice of it before he has paid the consideration money. Nay, if he received it at a time when it was in his power to save himself, he will be considered as a purchaser with notice.

If Mr. Pickett can be in a better situation than Stockdell would have been, he must not only be a purchaser without notice, but he must prove that he gave a full bona fide consideration and that he has paid the whole of it.

I say, he must have paid a full consideration, for if the assignor of a bond be liable to the assignee in case he cannot receive payment from the obligor and less is paid for the bond than its real nominal amount, it is usurious.

I admit that the answer of Pickett contains strong general averments that he paid the whole consideration before notice of Morris' equity. But this general assertion is qualified by other parts of the answer, and when he is called upon to state the exact consideration paid for the bond, he refuses to do so and contents himself with a round declaration that it was adequate. In opposition to this evasive denial of those material points, there is one witness who thinks he gave notice to Pickett of the equity of Morris before the assignment was made. Independent of this, it appears by the answer that

long after the assignment was made and when it is not denied that Pickett had notice, he went on to increase the debt due from Stockdell, instead of saving himself and Morris with Stockdell's property in his hands, which it was in his power to have done.

There is then the testimony of one witness opposed to the answer. Let us see if there be not circumstances in aid of the former sufficient to outweigh the latter. In the first place, the enquiry which the witness states Mr. Pickett to have made would have been more naturally thought of before than after he had paid his money. Secondly, the silence which the answer observes as to the date of the assignment. Thirdly, the appellant's having property of Stockdell's so long afterwards in his possession. Fourthly, the judgment, which Morris had obtained against Stockdell in the very town in which Pickett resided, which as to the discount is strong presumptive notice. The judgment specifically bound the very subject in which Pickett was dealing.

Randolph³³ on the same side. Morris has a two-fold equity against Pickett; First, his right to discount against Stockdell, and Secondly, his equity against Littlepage on account of the Kentucky land. I shall not notice the first point here, as the subject has been duly discussed in the case of *Norton and Rose*. But I will make this observation as to the fact of notice, that where an answer is to prevail against the testimony of a single witness, it should be plain, candid, and clear of every appearance of concealment. This answer denies that the defendant knew of any disputes about the bond, instead of being responsive to the interrogatory, whether he knew of any objections to it by Morris?

The question then, which is now to be considered, is whether Pickett is liable to the discount claimed by Morris? It is admitted that Morris knew of his bond having passed into the hands of Stockdell; he had therefore a right to keep up Stockdell's bond for the purpose of a discount.

If Morris had once a right to oppose Stockdell's claim, it should be shown by what means he has lost it. It is said that he has waived the right; first, by an express refusal, and secondly, by an implied waiver. The reason which induced the refusal to discount was entirely justifiable. He had no objection to the discount in case he was really indebted to Stockdell. But the fact was otherwise; the bond which he held was charged with in equity against it, which might have destroyed its force altogether.

As to the implied waiver of his right to discount, I would ask whether the debt due from Stockdell was less binding because the dignity of it was increased? Or will it be contended that a judgment cannot be set off against

³³ Edmund Randolph (1753 - 1813). He was Attorney General of the United States from 1790 to 1794.

a bond, as well as one bond against another? The only proper time at which Morris could make an election which could be obligatory upon him was when Stockdell or his assignee should bring suit, and when that opportunity did occur, it was made in favor of the discount.

But it is contended that the Act of Assembly does not apply to discounts against mesne assignees. The word plaintiff which is used by the legislature obviously expresses the same thing as assignee would have done; and if this latter word had been used, it would have run through the whole string of assignees, however numerous they might be. The reason of allowing discounts, being to avoid multiplicity of suits, it applies as well to mesne assignees as to the one in whom the right to the debt ultimately rests.

The next question respects the jurisdiction of the Court of Chancery. Morris, as I before observed, had a two-fold equity; one which might properly have been decided upon at law; but the other which respected the Kentucky land was a question which belonged exclusively to the Court of Chancery. If the latter had been the only ground of the application to that court, no one could have denied its jurisdiction. But it is well known that if that court will entertain the suit at all, it will decide the whole case, though involving points properly determinable at law.

Discounts are not less a subject of equitable jurisdiction because they may also be determined at law. Until the statute, the parties were driven into that court to obtain the benefit of discounts, and the jurisdiction is not ousted by its being concurrent with the courts of law. Independent of these considerations, there was not only mistake, but accident in this case. The counsel were evidently led off from the true point of discussion, into an enquiry about notice, which was entirely unimportant and from this cause it probably was that they neglected to file exceptions to the opinion of the court. It was accident alone which prevented a new trial from being granted upon the first application, and the offer of Pickett to wait a month, until Morris could have an opportunity of obtaining an injunction, allured the latter from his purpose of renewing the motion.

Marshall in reply. Whether the equity attached to a bond follows it into the hands of the assignee or not is a question I mean not to argue because I consider it to be unimportant in his cause. If Littlepage himself had been plaintiff, he could not have been opposed by this equitable objection. The only evidence of his equity is the answer of Littlepage, a bill filed in Kentucky concerning this land, and a paper signed by Johnson who contests the right of Morris to a fulfillment of Littlepage's contract. But none of these papers can be considered as evidence of the fact.

If, then, Morris had in reality no equity against this bond, his refusal to discount was an absolute waiver of his right. It is said that there is no time

limited within which the election to discount or to waive it is to be made and that he might use it at the trial. I do not contend that he was bound to make it sooner, but if he expressly refuse before the trial to make it and in consequence of his doing so, his bond is assigned away to a fair purchaser, he is bound by it and cannot afterwards reclaim his right to discount. The reason assigned by Morris for his refusal was not real but a mere subterfuge used for the purpose of enabling him to purchase up his own bond for less than its value and therefore it cannot qualify that which I term an express waiver.

I do not say that the bringing suit upon Stockdell's bond was of itself a waiver or that the judgment could not be made an offset, but it is evidence of his mind upon the subject that the discount was not to take place for if it had, Morris must have been nonsuited as the bond due from him to Stockdell amounted to a greater sum than what was due to him.

I have contended that by the literal words of the act, the defendant cannot set up a discount against an intermediate assignee, to which it is answered that if the law be thus strictly interpreted, a bond can be assigned but once. I cannot clearly comprehend the justness of this conclusion, for it is plain from the words of the law that any person or persons having the legal title may assign, which must mean more than one assignment.

If payments be made or if property be sold to an intermediate assignee, this would be an actual discharge of so much of the bond and might be given in evidence without the aid of the proviso; but this is very different from a discount which could not be made were it not for this law.

If Morris could not have set up the discount at law, there is an end of the cause. But if he could, he cannot now resort to a court of equity to get the benefit of it. The whole case has once been tried and decided upon before a competent jurisdiction. I contend that the same question cannot be reexamined and rejudged in any but an appellate court. I am now speaking of the discount alone. The case of *Ambler and Wyld* does not sustain the jurisdiction of the court of chancery as now contended for. In that case, material testimony was not permitted to go to the jury, and, of course, the whole case was not before them nor decided upon by them. This court declared that if the whole evidence had been laid before the jury, the decision would have been otherwise. In this case, nothing was kept back; the question which we are litigating here is the very same which was contested and decided by the jury with the very same evidence which is exhibited to this court.

It is said that the counsel and jury were entangled with a question which was unimportant and by that means they were reduced from the true point in the cause. This is mere conjecture and is not warranted by any part of

the record. But if it were, I do not agree that the mismanagement of counsel or the misconceptions of the jury will give jurisdiction to a court of equity over a subject which has been fully examined and decided upon by a jury.

It is said that the court of chancery had an original jurisdiction as to discounts which is not ousted by the statute. This is admitted, and it then follows that the courts of law and equity have concurrent jurisdiction upon that subject.

It will I presume be admitted that those courts have also concurrent jurisdiction in matters of account, but because this is the case, will it be contended that if a suit be brought at law upon an account and a decision be there had, the very same subject may be reexamined in a court of equity? As well might a court of law rejudge a case decided upon in equity, under the plea of concurrent jurisdiction.

As to all the other pretenses for giving jurisdiction to the court of chancery, they are mere conclusions of the counsel without being warranted by the record, such are the supposed blunders of the counsel in discussing the equity instead of the law of the case; in their being dazzled by Pickett's offer of waiting a month and being thereby put off from their first intention of moving for a new trial.

It is contended that Pickett had notice of Morris' discount. This is not proved, but if it were and if he also knew that Morris had rejected the discount, he certainly would not have been bound to admit it. Neither is there any evidence that Pickett had it in his power to save himself or that there was anything like usury in the transaction. These are points not stated in the bill and therefore could not be noticed by the court, even if they were proved by the evidence.

As to Morris' judgment, it could not be even implied notice to Pickett who was not privy to or bound by it. But there is the strongest reason to believe that the judgment was obtained after the assignment; for if it had been otherwise, it is highly probable that Stockdell would have offered Morris' bond as an offset.

The Court desired this cause to be spoken to again upon the point of jurisdiction.

Duval³⁴ for the appellee. The conduct of the court in refusing to seal the bill of exceptions prevented Morris from appealing and produced an injury against which a court of equity may relieve. I admit that the statute points out a mode of proceeding where the court refuse to seal a bill of exceptions; but it does not follow from thence that equity may not exercise a

³⁴ William Duval (1748 - 1842).

concurrent jurisdiction over the subject and prevent the injustice which must result from an unfair trial or one where the parties have not been fully heard and where the judgment is apparently wrong. 3 Morgan's Essays 291³⁵ provides that a court of chancery will interfere if the jury be misdirected. So if the court refuse to direct the jury and they find an inequitable verdict, the Chancellor may with propriety interfere. After many new trials have been granted at law, this court will for the furtherance of justice grant another. 3 Morgan's Essays 91.

Wickham. I think that the jurisdiction of the court of equity in this case may be maintained, as well upon the general principle and constitution of that court as upon the decisions of this court on similar cases.

If a want of jurisdiction appear upon the face of the record in proceedings at common law, the judgment may be arrested or reversed. But in chancery causes, the jurisdiction must be specially objected to by plea. It may be said perhaps that this bill gives jurisdiction to the court and that therefore no plea to the jurisdiction could have been properly put in. But since all the material allegations in the bill are proved, the court must retain its jurisdiction if the bill gave it, if it did not, then it ought to have been objected to by plea.

If the appellant had meant to oppose the relief prayed for because of the judgment at law, he should have pleaded it in bar, and by answer, denied the equity stated in the bill. The County Court when called upon to instruct the jury as to the evidence, and to determine whether the discount which was offered by Morris was legal or not, refused to give any opinion at all, improperly submitting to the decision of the jury a legal question which it was the duty of the court to have determined.

The case of *Ambler and Wyld* comes fully up to this. The question in that cause was whether the referees had valued the house in specie or in paper money. The original valuation could not be found, and therefore, the referees were examined upon that point, who declared that they had a specie valuation in view. The whole case turned upon their evidence, and Wyld was prepared with testimony to prove that the valuers had made declarations on the subject, the reverse of what they then deposed. But the County Court before whom the cause was tried refused to suffer the witnesses to be examined, this court determined that they were wrong in that opinion, and that where the decision of the inferior court was manifestly erroneous, the omission of counsel to file a bill of exceptions should not bar the jurisdiction of the chancery. The Chancellor said that if this evidence had been heard, the verdict might have been different. But the ground of the injunc-

³⁵ *Stace v. Mabbot* (Ch. 1754), *J. Morgan, Essays on the Law of Evidence*, vol. 3 (1789), p. 89 at 91; also reported at 2 Vesey Sen. 552, 28 English Reports 352.

tion could have been no other than the error committed by the court in refusing the examination of the witnesses.

If we refer to British decisions, they will abundantly prove that equity may grant relief, although the matter has been decided at law.

In the case of *Graham v. Stamper*, 2 Vern. 146,³⁶ the defendant in equity pleaded the verdict and judgment at law and that the defendant had insisted upon the same matter at law where it was ruled against him and demurred. But this was not thought sufficient to bar the relief prayed for, and the plea was overruled. So in the case of *Robinson v. Bell*, 2 Vern. 146,³⁷ the ground of the bill was that the plaintiff's attorney had by mistake and contrary to instructions pleaded a general, instead of a special, plene administravit. The court relieved against this mistake, although the bill did not state that the discovery was made before the judgment.

If such be the decisions in England, there is a much stronger reason why a court of equity should be more liberal in granting relief in this country in cases which have been decided in the County Courts. The want of legal knowledge in those courts and the loose manner in which business is generally conducted there will frequently produce improper and unjust decisions of cases, which in many instances could only be remedied in a court of equity. A distinction of this sort is even warranted by English cases. In *Finch Ch. Cas. 472*,³⁸ we find that relief was granted against the judgment of an inferior court on account of improper conduct, and a distinction is taken between the decisions of such courts and those of the superior courts.

Another ground of jurisdiction is the mistake of the jury. The only question was if the debt had been paid, and if the court had determined as they should have done that the discount offered by the appellee was proper, the verdict must have been different from what it was, yet this opinion of the court was withheld. The jury were led to believe that the material point in the cause was whether Pickett was a purchaser with or without notice, and not being satisfied that he was the former, they found for him. I know that in *Ambler and Wyld* it was said by the court that if the whole evidence had been left to the jury, the decision would have been otherwise. But it will be noticed that in this case, the error committed by the jury was in the law of the case.

³⁶ 2 Vernon 146, 23 English Reports 701 (1690).

³⁷ 2 Vernon 146, 23 English Reports 701 (1690). This case is copied in 'Equity Reports and Records in Early Modern England', *supra*, p. 68.

³⁸ *Vaulx v. Shelley*, Reports temp. Finch 472, 23 English Reports 255 (1680). See also, Case 801, Lord Nottingham's Chancery Cases, Selden Society, vol. 79 (Yale ed. 1961), p. 611.

A court of equity will relieve against an award if there be an evident error on the face of it or if the arbitrators have mistaken the law of the case. A verdict is not more solemn nor more obligatory upon the parties than an award. This court have gone into the recesses of a jury room to get evidence of the irregularity and mistake upon which the verdict was given. *Cochran v. Street*.³⁹ In *M'Rae v. Woods*,⁴⁰ the jury considered the plaintiff as entitled to half the ticket, but from the evidence, it was clear that if he were entitled to any part, it could not be to more than a fourth, yet this court sustained the decree of the Chancellor which awarded a new trial.

It may be contended that Morris' attorney might have renewed his motion for a new trial. There is some obscurity upon this subject, and it can only be cleared up by supposing that his counsel was led off from his purpose of doing so by Pickett's offer to stay execution until he could apply for an injunction. It appears that after a fifth magistrate came upon the bench, the motion was renewed and then abandoned. But to make the most of this, it was a mistake of counsel against which this court may relieve.

Randolph. Let us consider this as an original case in the court of chancery, that Morris had there filed his bill against Pickett calling upon him to surrender the bond on the ground of his original equity against it or because of the discount; or if the ground of the bill had been that Pickett might have saved himself out of Stockdell's property and had failed to do so, in all these cases the court of equity would have had complete jurisdiction. So it would if the bill had called upon Pickett to discover how much he had paid for the bond; for if Stockdell could have sought relief against an unconscionable or usurious bargain (which will not be denied), it is equally clear that Morris possessed the same right.

What then is to bar us from this equitable relief after a decision at law? If a verdict be rendered after a full and fair trial upon the law of the case, I admit, that the interference of the court of chancery would be improper. But if the cause be mixed with a question of equity, where the jurisdiction is concurrent, as in cases of fraud, discounts, and the like, and a wrong decision has been given, Chancery will interfere and relieve, although the same points have been pressed at law.

A court of equity will entertain a suit in the case of a lost bond, although there is also a remedy at law, 3 Durnf. and East 151.⁴¹

³⁹ 1 Washington 79 (1792); the chancellor's opinion is printed at Wythe's Reports 133 (1791).

⁴⁰ 2 Washington 80 (1795); the chancellor's opinion is printed at Wythe's Reports 253 (1794).

⁴¹ *Read v. Brookman*, 3 Term Reports 151, 100 English Reports 504 (1789).

The case of *Kent v. Bridgman*, Prec. in Ch. 233,⁴² establishes this principle, that where there is concurrent jurisdiction, though the party at law attempted to avail himself of a point proper for the determination of that court and failed, yet he might seek relief in equity. Now, although the whole case in *Kent and Bridgman* was not submitted to the jury and therefore an attempt may be made to distinguish that case from the present, yet it is obvious that the ground of the decision was not the failure to produce the judgment but the fraud, which was examinable in equity as well as at law. The Chancellor sustained the cause upon the ground of a concurrent, and not of an appellate, jurisdiction.

Marshall. The principle which I have endeavored to maintain is this; that when the whole question has been completely before the jury, accompanied by no circumstance which could prevent a full and fair decision of the case, by that body there is no remedy but in an appellate court. If the party apply for relief to a court of equity, he must rely upon other ground than legal errors in the decision complained of. Let all the cases which have been cited be examined, and it will be found in each of them that the whole case was not decided upon by the jury. In 2 Morgan's Essays 291,⁴³ the jury did not decide upon the discounts. 3 Morgan's Essays⁴⁴ is no ways applicable.

In the case of *Kent and Bridgman*, there was an equity which was not determined at law; there was a fraud practiced and proved, but still the party could not recover at law without a copy of the judgment; of course, the subject of the fraud was not tried at all, and the jury were directed to find for the plaintiff because the judgment was not produced. This is precisely within the rule I have stated.

It is then contended that if it were intended to object to the jurisdiction, it should have been done by plea. This is founded I suppose upon the Act of 1787, which declares, "that after answer filed and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made etc."⁴⁵

The construction of this law must necessarily be restrained to cases where the bill shows a right in the plaintiff to recover. For where the plaintiff has no right at all and if he be barred by a judgment at law, it is not necessary, nor would it be proper to plead to the jurisdiction. Such a plea

⁴² 24 English Reports 113 (1704). This case is copied in 'Equity Reports and Records in Early Modern England', *supra*, p. 81.

⁴³ *Foxcroft v. Devonshire* (K. B. 1760), *J. Morgan, Essays on the Law of Evidence*, vol. 2 (1789), p. 275 at 291, also reported at 2 Burrow 931, 97 English Reports 638, 1 W. Blackstone 193, 96 English Reports 105.

⁴⁴ *Stace v. Mabbot* (Ch. 1754), *ut supra*.

⁴⁵ Act of Oct. 1787, chap. 9, § 2, 12 *Hening's Statutes* 465.

admits the right of the plaintiff but denies the power of the court to decide upon it. Thus, if a suit in chancery be brought upon a bond, the plaintiff having a right to recover, the defendant must apprise him in an early stage of the cause that he means to object to the jurisdiction of the court. But if by the plaintiff's own showing, or otherwise, it appears that the bond has been paid off or that he had brought a suit at law upon it and a verdict and judgment had passed against him, would a court of equity be bound to decree in his favor because there existed an objection to its jurisdiction which had not been taken advantage of by plea?

It is said that the defendant should have pleaded the judgment in bar. But this is not necessary where the same matter is stated in the answer and is also relied upon in bar, or if (as in the present case), the plaintiff himself states the judgment in his bill. In *Ambler and Wyld*, the whole case was confessedly not before the jury, for the court would not permit them to hear all the testimony which was offered.

In the case cited from Finch Ch. Cas. 472, the court had no right to decide at all for want of jurisdiction, so that in fact there was no judgment.

In 2 Vern. 146, there was a secret equity, of which the defendant could not avail himself at law; for the court was not at liberty to enquire into the legal error, whilst the question was depending in a superior court. In the case now before the court, there is no equity unmixed with law, since the discount might have been made at law. In the case last cited, the mistake was not triable at law, and of course, it was not enquired into nor decided upon by the jury. The case of *Bosanquett and Dashwood*, Talb. 90,⁴⁶ was a suit to be relieved against an usurious contract.

If the jury mistook the law as to the discount, it does not from thence follow that a court of equity can interfere; for if so, every error of the common law courts may be re-examined and rejudged in this court. In the case of *Cochran and Street*, this court did not set aside the verdict because it was wrong but because a part of the jury had been imposed upon by the others.

As to the power which it is said Pickett had to save himself, there is no proof of it.

I am at a loss to comprehend the distinction which is taken between cases of a merely legal nature and such as are mixed with equity. I admit that in the latter case, the two courts have concurrent jurisdiction, but if the whole subject be decided in the court of law, equity can no more reexamine it than the courts of law in a similar case could reexamine a decree of the court of chancery.

⁴⁶ Cases temp. Talbot 38, 25 English Reports 648 (1734).

I admit that a suit may be brought either at law or in chancery where a bond is lost. But if it be decided in either court, the other cannot interfere.

Roane, J.⁴⁷ Wherever a case is fully and fairly tried in a court of law, the decision is binding upon the parties, and a reexamination of the cause in a court of equity is certainly improper. The parties, by submitting to the decision of that tribunal, must be governed by it, whether it be right or wrong. But this principle will extend to no case where there has not been a fair trial, as well as a full discussion of the cause.

In this case, the appellee at the trial in the County Court offered the bond of Stockdell as a discount against the demand, which ought certainly to have been allowed. For I cannot consider any part of Morris' conduct as amounting to a waiver of his legal right to insist upon the offset. His refusal at one time to admit the discount is satisfactorily accounted for. He had strong reasons for believing that he might oppose the payment of his bond to Stockdell by the equity growing out of the original contract for which that bond was given.

It appears that the counsel for Morris moved the court to instruct the jury that the discount was proper; this they refused to do, as well as to recommend a special verdict. In consequence of this improper conduct in the court, the jury found a verdict most obviously against the very right of the case. For I hold it most clear that either party has a right to demand the opinion of the court upon questions of law which may arise during the trial of a cause. Their superintendence in explaining and deciding legal questions is essential to the proper administration of justice and ought to be exercised when either party require their interference.

The second motion which was made for a new trial was not overruled by the court, but for some reason or other which does not certainly appear, it was abandoned by the defendant. Although there is no testimony in the cause leading to a suspicion that Pickett's offer to stay execution until an injunction could be applied for proceeded from an improper motive in him, yet it is highly probable that it tended to divert Morris from his purpose of persevering in the motion.

I think the decree ought to be affirmed.

Carrington, J.⁴⁸ It would perhaps seem strange that a court of equity should not possess the power of relieving against a judgment at law, obviously unjust, and against the right of the cause. In cases of fraud, surprise, accident, trust and the like, where that court has complete jurisdiction, it is within its peculiar province to grant relief where the parties

⁴⁷ Spencer Roane (1762 - 1822).

⁴⁸ Paul Carrington (1733 - 1818).

cannot obtain it at law. It is true that the party asking for its interposition must show himself entitled to equity superior to that of the person who has unconscientiously obtained the advantage at law.

I admit that the courts of law and equity should be confined within their proper spheres and that the line which separates their respective jurisdictions should be carefully guarded. With equal jealousy would I watch over and preserve from violation the trial by jury. But it is not less important that the court should exercise those functions which properly belong to them. To the former belong the uncontrolled power of deciding upon facts and even upon the law if it be submitted to them. The province of the latter is to determine upon those legal points which come properly before them. It is therefore the duty of the court to instruct the jury upon the law when they are required to do so or to reserve the point if either party desire it. If the opinion of the court be wrong, there is then a way to get it corrected. If the opinion be right and yet the jury disregard it, the court may preserve its privilege by setting aside the verdict.

Can it be contended that this cause was fully and fairly tried when the only important part of the appellee's case was not decided upon by the jury? When the court refused to state to the jury the law as it respected the discount, they as effectually excluded it from the consideration of the jury as if they had done it in express terms; for though it was laid before the jury, yet it was a question proper for the decision of the court, and their refusal to give that decision kept it out of the view of the jury as the verdict evidently proves. The jury were then mistaken in the law, and being involved in unimportant discussions upon points no way relative to the cause, they were allured from the only one which was material.

Independent of this, it is clear that the parties were surprised into the abandonment of their first intention of moving for a new trial by the offer of Pickett to stay execution until an injunction could be applied for. It cannot be questioned but that equity may relieve against the mistakes of a jury as if they miscalculate or omit to allow discounts to which the party injured can prove himself entitled.

I think that the case of *Ambler and Wylde* is not distinguishable in principle from this. That cause was determined before a court of competent jurisdiction, but it was determined improperly. The party aggrieved might have appealed, but he did not; yet this court decided that equity might relieve him against this erroneous judgment of a court of law.

In this case, it is apparent that there was a struggle for a general verdict and that the law and right of the case was stifled in the conflict.

I think the decree right and that it should be affirmed.

Lyons, J.⁴⁹ There have been three questions made in this cause; the first has been decided in the case of *Norton and Rose*. The second is whether the conduct of Morris has not deprived him of the discount of which he now endeavors to avail himself. Thirdly, whether, if he be entitled to the discount, he can have the benefit of it after the verdict and judgment against him.

Upon the second point, it is contended that Morris having once refused to admit the discount, he has thereby waived his right to assert it against a bona fide assignee. How far an unqualified refusal might have bound him, it is unnecessary to decide because I am clear that his conduct did not amount to that. Whether the equity under which he sheltered his refusal to discount was well founded or not is not material; it was evidently the cause of his refusal, and it cannot from the circumstances which attended it be considered as a mere pretext to avoid the discount. There was at the time a suit depending in the State of Kentucky, the event of which he could not possibly foretell. This is sufficient to repel the presumption of an intention to waive. Under these circumstances, it was a fraud in Stockdell to assign the bond without giving notice of the discount which Morris had against it. Whatever may be the equity of Pickett, that of Morris was prior and equal to it, besides which he had a legal right to set up his discount. But in fact Pickett must be considered as standing in the shoes of Stockdell since it was his duty to have enquired of Morris respecting the bond before he took the assignment of it.

There can be no doubt then of Morris' right to relief unless he be barred of it by the verdict and judgment at law, which brings me to the consideration of the third point.

If what I have before stated be correct, it is clear that Morris has a sufficient discount against the claim of Pickett, both at law and in equity. But it is contended that he cannot now obtain the benefit of the discount because he has lost the opportunity which he once had of availing himself of it at law. But I would ask when it was that this opportunity presented itself? At the trial of the cause at law, he claimed the discount and it was rejected. Considering the question as a legal one, he prayed the opinion of the court upon it, or if they doubted, that they would recommend a special verdict; they refused to do either. He then tendered a bill of exceptions which they would not sign. He was equally unsuccessful in obtaining a new trial. What more could he have done? The Superior Court could not relieve him because nothing was spread upon the record which could avail him there. If he had applied for a mandamus or pursued any other method of obtaining relief save the one he did, an execution might have issued, and he must have experienced in the meantime the effect of an unjust and inequitable

⁴⁹ Peter Lyons (c. 1734 - 1809).

verdict. And is it possible that a right thus clearly established should be destitute of a correspondent remedy? I thought it was the peculiar province of a court of chancery to afford relief in cases where competent remedy could not be afforded somewhere else.

I admit that in this case, the party had [a] complete remedy at law, and if the cause had been fully and fairly decided there, equity would not have interfered. But this was not the case. The refusal of the court to decide upon the points which were properly submitted to them prevented a just determination upon the only important question in the cause, and their subsequent refusal to seal the bill of exceptions shut out the parties from the proper tribunal to have corrected them. Suppose the jury should obstinately decide against the opinion of the court upon a point of law or should disregard their recommendation to find a special verdict; there could be no relief in a court of law against two improper verdicts as a second new trial could not be awarded. Would it not be monstrous to say that in such cases, a court of equity could not afford relief?

The Chancellor was not bound to grant a new trial because being in possession of the whole case, there was nothing to prevent a final decision.

The case of *Burrows v. Jemino*, 2 Str. Rep. 733,⁵⁰ the Chancellor relieved against a judgment, upon a point, which he was of opinion the court of law ought to have decided in favor of the plaintiff in equity, but he observed "that other judges might have been of a different opinion".

Ambler and Wyld is nearly parallel with this, for in that case, as in this, the mischief complained of arose from the error of the court. But there is this difference between them which renders this a stronger case, in that, the party might have appealed; in this he could not because the bill of exceptions was not sealed.

This is certainly a hard case upon Pickett, but he who trusts most must submit to bear the consequences of his misplaced confidence.

[The] decree [was] affirmed.

II

Court of Appeals Order Book No. 3, p. 144 (1 November 1796)

This cause was this day fully heard on the transcript of the record and the arguments of the counsel, but because the Court here is not yet advised of their judgment to be given in the premises, they take time to consider thereof.

⁵⁰ 2 Strange 733, 93 English Reports 815 (1726).

III

Court of Appeals Order Book No. 3, p. 149 (11 November 1796)

Upon an appeal from a decree of the High Court of Chancery pronounced the seventeenth day of March 1795, this day came the parties by their counsel and the Court having maturely considered the transcript of the record and the arguments of the counsel is of opinion that there is no error in the said decree. Therefore it is decreed and ordered that the same be affirmed and that the appellant pay to the appellee his costs by him about his defense in this behalf expended, which is ordered to be certified to the said High Court of Chancery.